A

RE NASPU DAUD; EX P AFFIN BANK BHD

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[BANKRUPTCY PROCEEDINGS NO. 29-266-2006-II]
B 9 JULY 2007

BANKRUPTCY: *Receiving and adjudication orders - Application to set aside - Whether sanction of Director-General of Insolvency required - Whether bankruptcy proceedings commenced prematurely - Bankruptcy Act 1967, s. 38(1)*

C

CIVIL PROCEDURE: *Jurisdiction - High Court - Vesting order - Enforceability - Whether vesting order granted by Kuala Lumpur High Court could be accepted and enforced by High Court of Sabah and Sarawak - Banking and Financial Institutions Act 1989, s. 50*

D

HIRE PURCHASE: *Repossession - Hirer's rights and immunities - Notice issued informing of public auction of repossessed vehicle - Whether bad in law - Bankruptcy proceedings - Hire Purchase Act 1967, s. 18(4)(a)*

E

This was an appeal by the judgment creditor against the decision of the deputy registrar allowing the judgment debtor's application to set aside the receiving and adjudication orders ('said orders'). In this case, the bankruptcy proceedings were commenced based on a judgment obtained by the judgment creditor arising from a F hire purchase agreement for a vehicle. The issues in the present appeal requiring determination were: (i) whether the sanction of the Director-General of Insolvency ('DGI') was required to make an application to set aside the said orders as required under s. 38(1) of the Bankruptcy Act 1967 ('BA'); (ii) whether the G vesting order granted by the Kuala Lumpur High Court could be accepted and enforced by the High Court of Sabah and Sarawak; (iii) whether the notice dated 29 December 2006 issued under s. 18(4)(a) of the Hire Purchase Act 1967 ('HPA') informing that the public auction for the sale of vehicle was fixed on 14 January H 2007 was bad in law; and (iv) whether on the facts of this case, the bankruptcy proceedings were premature and the said orders were rightly set aside.

I

Held (dismissing the appeal):

(1) On the issue of whether sanction from the DGI was necessary to make an application to set aside the said order, on the facts of this case: (a) sanction is not necessary for any application made pursuant to the bankruptcy proceedings itself as stated in the case of *Re Khoo Kim Hock*; (b) s. 38 of the BA is not substantive law but only a procedural requirement, and the court can condone non-compliance, which at times may be necessary because of the practical difficulties in obtaining consent; (c) the court may, if it deems fit and proper, place conditions before hearing the bankrupt by ordering the costs of the proceedings which the bankrupt has to mete out in the event his action or application does not succeed. Such costs in the ordinary cause must be paid by third parties on behalf of the bankrupt. In addition, the court can issue a show cause letter for the DGI's office to be present, and explain why sanction was not granted and make the necessary orders according to the justice of the case. What is important for the court to consider when making such directions or orders is to make sure that the bankrupt does not deplete his estate by filing or defending actions and, thereby, prejudicing the interest of his creditors; and (d) the learned judge of the Court of Appeal in *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* had made it clear that it was for the bankrupt to demonstrate to the court the steps he had taken to comply with the provision of s. 38(1)(a) of the BA. This is a condition precedent before any orders can be made as suggested above, unless it is an application under ss. 92(1) or 105(1) of the BA or its like. (para 14)

(2) On whether a vesting order made by the High Court of Kuala Lumpur can be enforced by the High Court of Sabah and Sarawak, the law does not prohibit the courts from doing so, when there are no prohibited acts which are done in the ordinary course of court proceedings and the practice is permissible. The recognition of vesting of properties made pursuant to Acts by the courts in common law jurisdiction is common. Further, vesting orders under s. 50 of the Banking and Financial Institutions Act 1989 ('BFIA') is nothing more than a procedure set out for judicial recognition of vesting of property both movable and immovable, not limited to choses in action *etc*. Ordinarily, the law recognises the rights and

A interest of property to be transferred by sale and purchase agreements or transfers according to various provisions of the Land Code ('LC') or by deed of assignment or by vesting pursuant to various Acts, for example, the Probate and Administration Act 1959 or the BA. Such sale and purchase
B agreements or transfers or assignments or vesting under the relevant Acts, whether made in West Malaysia or East Malaysia, must be recognised by the respective courts. Similarly a vesting order made pursuant to s. 50 of the BFIA, having obtained judicial sanction, requires the court to
C recognise the new proprietor or judgment creditor *etc* as the case may be. A s. 50 Order is like that of an omnibus order to vest titles, rights and interest, inclusive of liability even under the LC, without the need to execute transfer forms and payments of prescribed fees, inclusive of *ad valorem* duty.
D (para 15)

(3) With regard to whether the notice was bad in law, this requirement to give notice is specifically set out in s. 18(4)(a) of the HPA. If the letter had been posted, it was very unlikely
E on the facts of this case that it would have reached the judgment debtor in time. On this issue, this court was inclined to accept the argument and reasoning of the judgment debtor. The mandatory requirement of s. 18(4)(a) of the HPA was not satisfied according to the intent and spirit of the law. In
F consequence, the notice under s. 18(4)(a) of the HPA was bad in law thereby rendering all subsequent proceedings subject to judicial scrutiny. This could be partly achieved pursuant to s. 20 of the HPA. Further, the judgment creditor was in breach of the salient terms of the HPA, and had
G operated in an unreasonable manner in pursuing the bankruptcy proceedings without taking into consideration the interest of the judgment debtor and his lawful entitlement to set off the judgment sum from the proceeds of the sale. The judgment creditor's stand that it did not have to account to
H the judgment debtor was coercive and must be seen as a proposition spiked with *mala fide*. If such acts were revealed at the stage of the hearing of the bankruptcy petition, then there were reasons for the court not to allow the petition. (paras 16 & 17)

I

(4) On the facts of this case, the creditor's petition ought not to have been allowed. The creditor's petition only alleged that the judgment debtor had committed an act of bankruptcy. This itself was not sufficient for the court to exercise its discretion, for s. 4 of the BA specifically says that the court may make the receiving order for the protection of the judgment debtor's estate. If the judgment debtor has no estate to protect, then s. 4 of the BA cannot be triggered. Courts have often said, even in cases for an extension of time to file affidavits, that there must be some material before the court can exercise its discretion. This principle often echoed by the courts is more relevant when it comes to depriving a subject of civil liberties. In such cases, there is a duty and obligation to ensure the judgment creditor satisfies all requirements set out in s. 4 of the BA before the debtor is made a bankrupt. The BA is not meant to give the creditor the authority to punish the debtor by making him a bankrupt. It is only meant to assist the creditors to share equitably in the estate of the debtor, provided there are assets. At common law, the *laissez fare* doctrine prevails in respect of all commercial transactions. The position is the same under the Contracts Act 1950 with some exceptions; for example, the BA and the Companies Act 1965 attempt to give some comfort to the creditors for their bad commercial judgments. That is all and nothing more. (paras 18 & 19)

Case(s) referred to:

Arab Malaysian Finance Bhd v. Hasliza Hasan [2001] 6 CLJ 137 HC ***(refd)***

Arab Malaysian Finance Bhd v. Suhaimi AW Mohamed [2000] 1 LNS 320 HC ***(refd)***

Butterworth Used Cars Sdn Bhd lwn. Mayban Finance [1991] 3 CLJ 1721; [1991] 1 CLJ (Rep) 520 HC ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 HC ***(refd)***

Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***

Lee Hui Jian v. Public Bank Bhd [2007] 2 CLJ 551 HC ***(refd)***

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***

M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd [2002] 5 CLJ 25 HC ***(refd)***

M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa [2004] 1 CLJ 274 CA

Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam [2006] 4 CLJ 458 CA ***(foll)***

A *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 HC* ***(refd)***
Re Khoo Kim Hock [1974] 1 LNS 134 HC ***(foll)***
Re Mohamad Supardi Md Noor; ex p Public Finance Bhd [2004] 4 CLJ 646 HC ***(refd)***
B *Re Siow Ah Moi; ex p United Orient Leasing Company Bhd [2007] 8 CLJ 104 HC* ***(refd)***
Richland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corporation Berhad [1995] 1 LNS 206 HC ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd [2003] 2 CLJ 671 HC ***(refd)***
C *Supreme Finance (M) Bhd v. Mohamad Noor (T/A Everway Food Centre) & Ors [1993] 2 MLJ 29* ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50
Bankruptcy Act 1967, ss. 4, 5(1)(a), (2), 38(1)(a), 92(1), 105(1), 131
D Courts of Judicature Act 1964, ss. 7(2), 23
Hire Purchase Act 1967, ss. 16, 17, 18(2), (3), (4)(a), 19, 20

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 26, p 302

E *For the judgment debtor - Mohd Ivan Hussein; M/s Ivan Hussein*
For the judgment creditor - Lina Wee; M/s Charles Ling

Reported by Suresh Nathan

F

JUDGMENT

Hamid Sultan Abu Backer JC:

G **[1]** This is my judgment in respect of the judgment creditor's appeal against the decision of the learned deputy registrar who allowed the debtor's application to set aside the receiving and adjudication orders (the said orders).

[2] The parties rely on the following authorities:

H

(i) *Lee Hui Jian (f) v. Public Bank Berhad* (Civil Appeal No. 12-7-2006) (ii) *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 (iii) *Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd* [2003] 2 CLJ 671 (iv) *Re Mohamad Supardi Md Noor; ex p Public Finance Bhd* [2004] 4 CLJ 646 (v) *Re Fong Yuan Kwong Ex Parte Public Bank Bhd* [1995] 1 LNS 203 (vi) *Leong Moh Sawmill Co.*

I

Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 (vii) *M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25 (viii) *Arab Malaysian Finance Bhd v. Suhaimi b AW Mohamed* [2000] 1 LNS 320 (ix) *Guardian Royal Exchange Assurance (Malaysia) Bhd v. National Union of Commercial Workers (NUCW) & Anor* [2000] 7 CLJ 89 (x) *Arab Malaysian Finance Bhd v. Hasliza Hasan* [2001] 6 CLJ 137 (xi) *Eastool Industries Sdn Bhd v. Getfirms Electronics (M) Sdn Bhd (No 1)* [2001] 6 CLJ 151.

[3] In this case, the bankruptcy proceedings was commenced based on a judgment obtained by the judgment creditor arising from a hire purchase agreement. The creditor's petition was fixed for hearing on 14 November 2006. The hearing of the petition was adjourned to 21 November 2006 pending settlement. On 21 November 2006 the petition was heard and the said orders were made against the judgment debtor.

[4] The judgment debtor on 24 November 2006 filed an application to set aside the said order, *inter alia*, on the grounds: (i) the judgment creditor is a different corporate entity, and is not formerly known as Affin-ACF Finance Berhad. (ii) the vehicle under the hire purchase agreement has been repossessed and will be disposed off by public auction or tender and the proceeds of the sale is likely to reduce the judgment sum to less than RM30,000. (iii) the officer in charge for the judgment creditor had informed that the vehicle would be put for public tender or auction on 26 November 2006. In consequence the officer in charge applied for adjournment of the creditor's petition to settle the matter on the belief that it was premature for the judgment creditor to pursue the bankruptcy proceedings. (iv) the judgment creditor's office had refused to allow the judgment debtor to know the reserve price fixed for the vehicle to enable him to get a buyer. (v) the judgment creditor is deliberately attempting to enforce the judgment sum fully without accounting for the value of the vehicle and thereby preventing the judgment debtor from settling the judgment sum. (vi) the judgment debtor had informed the judgment creditor of his new address but the letter dated 29 December 2006, issued under s. 18(4)(a) of Hire Purchase Act 1967 (HPA 1967), informing the auction was fixed on 14 January 2007, was sent to the old address.

[5] In opposing the application the judgment creditor, *inter alia*, says as follows: (a) by virtue of order made by Kuala Lumpur High Court, all business and assets of Affin-ACF Finance Berhad were transferred, vested and taken over by Affin Bank Berhad (said vesting order), the judgment creditor herein. (b) the judgment debtor had failed to exercise his option to purchase the said vehicle and the judgment creditor is at all material times the owner of the said vehicle. There is no necessity in law for the judgment creditor to account to the judgment debtor the proceeds of sale upon disposal of the said vehicle.

[6] In my view the real issues which need to be dealt by this court to decide the fate of this appeal are whether: (i) the vesting order granted by the Kuala Lumpur High Court can be accepted and enforced by the High Court of Sabah and Sarawak. (ii) the sanction of the Director-General of Insolvency (DGI) is required to make an application to set aside the said order as required under s. 38(1) BA 1967. (iii) the notice under s. 18(4)(a) HPA 1967 is bad in law. (iv) on the facts of the case, the bankruptcy proceedings was premature and the said orders were rightly set aside.

[7] The judgment debtor before the learned deputy registrar has *inter alia* submitted as follows: (i) the relevant provisions in the HPA 1967 which are applicable here are ss. 16 to 20. (ii) section 16 speaks of the right of the owner to repossess goods and the notices that are required to be given to the hirer. (iii) section 18 touches on the hirer's rights and immunities when goods are repossessed. (iv) the provisions in s. 18 will apply even after judgment has been obtained. Section 18(2) reads as follows:

> (2) Where the owner takes possession of any goods comprised in a hire-purchase agreement the owner is not entitled to recover any sum (whether under a judgment or order or otherwise) which if added together with:
>
> (a) the value of the goods at the time of the owner so taking possession thereof; and
>
> (b) the amount paid or provided, whether by cash or other consideration, by or on behalf of the hirer under the agreement,
>
> exceeds the net amount payable in respect of the goods.

(v) this means that even if the judgment creditor had obtained judgment against the judgment debtor before repossession of the vehicle, once repossession has been made, s. 18(2) of the HPA 1967 must be complied with. (vi) Section 18(3) defines net amount payable as follows:

> (3) For the purposes of this section
>
> (a) the net amount payable is the total amount payable less the statutory rebates for terms charges and insurance as at the time of the owner taking possession of the goods; and
>
> (b) the value of any goods at the time of the owner taking possession thereof is -
>
> (i) the best price that could reasonably be obtained by the owner; or
>
> (ii) if the hirer has introduced a person who has bought the goods for cash, the amount paid by that person,
>
> less:
>
> (iii) the reasonable costs incurred by the owner of and incidental to his taking possession of the goods;
>
> (iv) any amount properly expended by the owner on the storage, repair, or maintenance of the goods; and
>
> (v) (whether or not the goods have subsequently been sold or disposed of by the owner) the reasonable expenses of selling or otherwise disposing of the goods.

(vii) the provisions of this section shows clearly that the judgment creditor has to account for the value of the goods. (viii) the legal proposition that the value of the goods must be accounted for is further strengthened by the express powers of the court to vary existing judgments under s. 20 of the HPA 1967, which reads as follows:

> In any legal proceedings in relation to a hire purchase agreement, after the owner has taken possession of the goods, the court before which the proceedings are brought may vary or discharge any judgment or order of any court against the hirer for the recovery of money so far as is necessary to give effect to section 18.

A The judgment debtor relies on the following cases namely *Arab Malaysian Finance Bhd v. Suhaimi b AW Mohamed* [2000] 1 LNS 320; *Arab Malaysian Finance Bhd v. Hasliza Hasan [*2001] 6 CLJ 137; *Butterworth Used Cars Sdn. Bhd. lwn. Mayban Finance* [1991] 3 CLJ 1721; [1991] 1 CLJ (Rep) 520 in support for the B proposition that the proceeds upon disposal of the vehicle must be deducted from the amounts owing by the hirer under any existing judgment. The judgment debtor further says that the argument is further strengthened by the case of *M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25, where the C court held that where bankruptcy proceedings are founded on a hire purchase transaction, the option to purchase in a hire purchase transaction is itself a property, which must be stated by the finance company as a security in the petition under s. 5(2) of the BA 1967, the failure to comply whereof would be fatal to the D bankruptcy proceedings. (ix) section 18(4)(a) of the HPA 1967, which reads as follows:

> (4) Where an owner takes possession of any goods comprised in a hire-purchase agreement and intends to sell them:
>
> E (a) by public auction, he shall be required to serve or cause to be served on the hirer a copy of the said notice of such public auction not less than fourteen days from the date the said auction is to be held; or
>
> F (b) otherwise than by public auction, he shall be required to give the hirer an option to purchase the goods at the price at which he intended to sell them if that price is less than the owner's estimate of the value of the goods repossessed as stated in the notice referred to in Section 16 (3),
>
> G and if he fails to comply with such requirement he shall be guilty of an offence under this Act.

The date of the notice was 29 December 2006, which was a Friday, whereas the auction was scheduled on 14 January 2007. H Under provisions of law in s. 18(4), the judgment debtor is to be given at least 14 days notice. In this case it was not done and in consequence the notice is bad in law. (x) there are good and valid grounds for the court to intervene and to exercise its powers under s. 105 of the BA 1967.

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[8] Finally, the judgment debtor says (i) that the proceeds of sale for the vehicle under the hire purchase agreement should be accounted for in a case where the vehicle has been repossessed and sold. (ii) the authorities cited by the judgment creditor are relevant only in cases where the vehicle cannot be traced or has not been repossessed. (iii) in those cases, owner can proceed against the hirer for the whole amount owing, but in this case where the vehicle has been repossessed and sold, the HPA 1967 requires that the value be declared in the Fifth Schedule Notice, and s. 20 of the HPA 1967 provides for any judgment sum to be varied.

[9] The judgment creditor on the issue of *locus standi* to present the petition *inter alia* submits as follows: (i) the learned deputy registrar allowed the judgment debtor's application on only one ground, that being under and by virtue of the decision of the High Court at Sibu in the case of *Lee Hui Jian v. Public Bank Bhd* [2007] 2 CLJ 551, the rights and interests of Affin-ACF Finance Berhad are not vested with Affin Bank Berhad and therefore the judgment creditor has no *locus standi* to take out bankruptcy proceedings against the judgment debtor. (ii) section 7(2) of the Courts of Judicature Act 1964 (CJA 1964) provides *inter alia* that all orders, whether civil or criminal, issued or made by or by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia. This statute was never cited in the case of *Lee Hui Jian (supra)* by the respondent/plaintiff's bank in that case. (iii) in *Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd* [2003] 2 CLJ 671, the vesting order was made under s. 50 of the Banking and Financial Institutions Act 1989 (BAFIA 1989). The High Court held:

> The relevant provisions of the Act in this context are enabling in nature and not prohibitory in that they made possible the transfer of SCB's business in Malaysia as a whole to the plaintiff through a single application to the High Court.

(iv) in *Leong Moh Sawmill Co. Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131, the Court of Appeal held:

> The vesting order was such that there was no requirement in law to effect a substitution of the plaintiff, and its effect was that the successor bank was deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank. This meant that the successor bank was very much a party to the order for sale obtained …

> Section 50(3) of (BAFIA 1989) provided, *inter alia*, that the transfer of any property or business pursuant to the order of the High Court under sub-s (1) shall on and from the transfer date become vested in or held by the transferee, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law. Thus, by virtue of the vesting order, there had been a transmission of interest from one legal entity to another …
>
> Under the provisions of O. 15 r. 7(2) of the Rules of the High Court 1980, there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s. 50(3) of the (BAFIA) Act, there was no necessity for a formal order under O. 15 r. 7(2) to regularize the position of the successor bank …

(v) moreover, the learned High Court judge in *Lee Hui Jian*'s case *(supra)* relied on s. 23 of the CJA 1964. But s. 23 deals with the jurisdiction of the courts to handle matters within their jurisdiction. Section 23 refers to "jurisdiction to try all civil proceedings ...". In consequence this section is not applicable.

[10] Further, the judgment creditor says that the learned deputy registrar ought not to have entertained the judgment debtor's application as no sanction has been obtained from the DGI as required under s. 38(1) of BA 1967.

[11] In addition, the judgment creditor says that the bankruptcy proceedings are not premature and *inter alia* submits as follows: (i) the gist of the respondent's argument was that the disposal of the said vehicle would reduce the amount due and owing to the judgment creditor. Besides, if the amount owing were below RM30,000, the judgment creditor would be unable to file the bankruptcy action against the judgment debtor as provided under s. 5(1)(a) of the BA 1967. (ii) whether the judgment creditor disposes off the said vehicle or not does not have anything to do with the judgment debtor. The judgment creditor is the owner of the said vehicle and the judgment debtor is only the hirer under a hire purchase agreement. The said vehicle is not the property of the judgment debtor until the judgment debtor pays the hire purchase price in full and exercises the option to purchase the said vehicle. In *Re Mohamad Supardi Md Noor; Ex p Public Finance Bhd* [2004] 4 CLJ 646, the High Court held:

> Unless the hire purchase price is fully paid, the debtor is incapable of exercising any power over the option to purchase. The debtor definitely could not exercise his power over something which he did not have …

In that case, the High Court further held:

> It is a fallacy to state that the financier will be unjustly enriched by adjudging the hirer a bankrupt and still claim rights over the hired goods. This is because the hired goods do not belong to the debtor hirer. The debtor merely hired the goods and does not own the goods until the full hire purchase price is paid. Hence the creditor can repossess the hired goods and sell the same. On the other hand the right to sue for the remainder of the installments in the event of default is provided for in the hire purchase agreement and is not subject to repossession or sale of the hired goods. These courses of action available to the financier are distinct and independent of one another.

(iii) the judgment creditor need not account to the judgment debtor for the proceeds of sale of the said vehicle as he has yet to exercise the option to purchase and the judgment creditor remains the legal owner of the said vehicle.

[12] On the issue of short notice in relation to s. 18(4)(a) HPA 1967, the judgment creditor *inter alia* submits as follows: (i) as for the judgment debtor's arguments affecting the notice, s. 18(4)(a) requires the judgment creditor to serve on the judgment debtor a notice that the auction would be held. According to the judgment debtor's submission, the notice was dated 29 December 2006 and the auction was on 14 January 2007. That was more than sufficient notice. (ii) the judgment creditor's action against the judgment debtor is not premature.

[13] On the issue whether sanction from DGI is necessary to make an application to set aside the said order, the relevant provision the court must consider is s. 38(1)(a) of the BA 1967 which states:

> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

A This section in my view is not a substantive law but a procedural requirement to maintain an action. It does not prohibit the bankrupt to sue or to defend. As a general rule, procedural requirement cannot and must not be elevated to the status of substantive law. The BA 1967 contains provision to condone non-
B compliance. This is specifically provided for in s. 131 of the Act which states:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial
C injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The ultimate decision maker whether or not to entertain the bankrupt's application is the court and not the DGI. Thus, to say
D a person cannot be heard without sanction from DGI cannot be correct in law. The court can condone such non-compliance if it wants to do for reasons stated in s. 131 of BA 1967. However, in almost all cases the court will like to ensure that the necessary consent has been obtained. Judges and jurist have put much
E thought to this section. The learned author, GK Ganesan as early as the year 2000, has documented a number of cases for and against the proposition for the need for sanction in his book *"Bankruptcy Law in Malaysia and Singapore – A Sourcebook of Principles, Practice, Procedure, Cases & Materials"*. Some of the cases
F are as follows: (i) *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 (ii) *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444 (iii) *Supreme Finance (M) Bhd v. Mohamad Noor (T/A Everway Food Centre) & Ors* [1993] 2 MLJ 29 (iv) *Richland Trade & Development Sdn Bhd &*
G *Ors v. United Malayan Banking Corporation Berhad* [1995] 1 LNS 206 (v) *Re Khoo Kim Hock* [1974] 1 LNS 134.

The learned author says:

> There is no requirement for sanction where the bankrupt
H challenges an order in bankruptcy, or where he applies to be discharged, or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction ie, s. 38(1)(a) has no application to a s. 92(1) or s. 105(1) application.

I The learned author had relied on the dicta of Mohamed Azmi J (as he then was) in *Re Khoo Kim Hock (supra)* which stands as *locus classicus* in this area of law. Mohamed Azmi J had opined:

> The first question for determination is whether the requirement of sanction of the Official Assignee under section 38(1)(a) applies only to a bankrupt's ordinary claims, ie, maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is *challenging the very validity of the adjudication order by which he has been adjudged bankrupt.* (emphasis added)
>
> …
>
> … it is my considered opinion that the sanction requirement *does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy,* or where he is *applying to be discharged* or where he is *seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction.* The exception contained within brackets in section 38(1)(a) clearly indicates that the section is *intended to apply only to actions for recovery of something* – either real or personal – which can be turned into assets such as a claim for recovery of property or money due. Further, there is *nothing in sections 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions.* Under section 33(1), a bankrupt may *at any time after being adjudged bankrupt* apply to the court for an order of discharge, and *there is no legal requirement* that for *this purpose* he should first obtain the sanction of anyone. (emphasis added).

In the Court of Appeal case of *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458, the appellants had obtained letters of administration for the deceased estate on 1 August 2003. The first appellant (the third wife of the deceased) brought probate proceedings as the deceased's widow. The second appellant (the previous second wife of the deceased, who had divorced the deceased) had brought proceedings in her capacity as the mother and guardian of her son. The deceased had a brother, the respondent. He lodged a caveat in the High Court against the appellants' petition. He was an undischarged bankrupt at all material times. The bankrupt applied to set aside the order granting the letters of administration. He had filed his application without the previous sanction of the official assignee, contrary to s. 38(1)(a) of the BA 1967. On those facts, Zulkefli Makinudin JCA who spoke for the Court of Appeal said that any sanction that was required under s. 38(1)(a) of the BA 1967 had to be a 'written sanction'. His Lordship said that the bankrupt had to demonstrate that he had made a formal written application to the official assignee, and that the official assignee had to issue

A a written sanction. Because the respondent had failed to do so he was incompetent to maintain the action. The only exception to this rule, his Lordship said, was as regards to an action for damages in respect of an injury to the bankrupt's person, quoting *M/s Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 1 CLJ B 274. The learned judge went on to observe that the mere presence of the official assignee in court in the proceedings before the High Court in the current did not show 'implied consent' for the respondent to maintain the action and to continue with the case. Gopal Sri Ram JCA said that the High Court, had fallen into C error in construing the presence of the official assignee's representative as amounting to consent. The Court of Appeal allowed the appeal.

[14] In all the above cases mentioned, the courts did not discuss D whether sanction is a substantive law or only procedural requirement which can be condoned pursuant to s. 131 of BA 1967. On the facts of this case, I take the view:

(i) Sanction is not necessary for any application made pursuant to the bankruptcy proceedings itself as stated in the case of E *Re Khoo Kim Hock (supra)*.

(ii) Section 38 is not a substantive law but only a procedural requirement. The court can condone non-compliance. This at times may be necessary because of the practical difficulties in F obtaining consent. In almost all cases, practitioner will attest that sanction will not be ordinarily forth coming from the DGI's office for various reasons; amongst that are as follows: (i) short of manpower to attend to the matters immediately (ii) not able to obtain the relevant papers and the views of G creditor to make an early decision, etc.

(iii) The court may, if it deems fit and proper, place conditions before hearing the bankrupt by ordering the costs of the proceedings which the bankrupt has to mete in the event his H action or application does not succeed. Such costs in the ordinary cause must be paid by third parties on behalf of the bankrupt. In addition, the court can issue show cause letter for the office of DGI to be present and explain why sanction was not granted and make the necessary orders according to I the justice of the case. What is important for the court to consider when making such directions or orders is to make

sure that the bankrupt does not deplete his estate by filing or defending actions and thereby prejudice the interest of his creditors. A

(iv) the learned judge of the Court of Appeal in *Priyakumary*'s case *(supra)* has made it clear that it is for the bankrupt to demonstrate to the court the steps he had taken to comply with the provision of s. 38(1)(a). This in my view is a condition precedent before any orders can be made as suggested above, unless it is an application under s. 92(1) or s. 105(1) BA 1967 or its like. B C

[15] On the issue of whether a vesting order made by the High Court of Kuala Lumpur can be enforced by the High Court of Sabah and Sarawak, I take the view that the law does not prohibit the courts from doing so, when there are no prohibited acts which are done in the ordinary course of court proceedings and the practice is permissible. Support for this proposition can be found in a number of cases. For example, Chong Siew Fai CJSS sitting in the Federal Court in *Goi Ching Ang v. PP* [1999] 1 CLJ 829 had asserted that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature. The learned author of *Halsbury's Laws of England,* 4th edn, vol. 26 at p. 302 says that: D E

> A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision is wrong. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before which the matter arises afterwards might not have given the same decision had the question come before it originally. F G H
>
> The supreme appellate court will, however, not shrink from overruling a decision or series of decisions which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing can be altered by the remedy of a mistake; and, where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is I

A no principle which precludes at any rate that tribunal from correcting the error, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say positively that it is wrong and productive of inconveniences. The Court of Appeal may, in a proper case, overrule long-
B standing decisions of the Divisional Court.

In general the House of Lords will not overrule a long established course of decisions except in plain cases where serious inconvenience or injustice would follow from perpetuating an
C erroneous construction or ruling of law. The same considerations do not apply where the decision, although followed, has been frequently questioned and doubted. In such a case it may be overruled by any court of superior jurisdiction. When old authorities are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the
D reasoning on which they were based and practical injustice in the consequences that must flow from them, it is the duty of the House of Lords to overrule them.

When, however, some words of doubtful meaning in a statute have received a clear judicial interpretation and the same words
E are repeated in a subsequent statute, the legislature must be taken to have read them on the second occasion according to the meaning given to them by that interpretation, and it is not then open to a higher court to reverse that interpretation. This is merely a rule of construction for the guidance of the courts; it is
F not a presumption which the courts are bound to make.

The recognition of vesting of properties made pursuant to Act by courts in the common law jurisdiction are common. Further, vesting orders under s. 50 of the Banking and Financial
G Institutions Act 1989 in my view is nothing more than a procedure set out for judicial recognition of vesting of property both movable and immovable, not limiting to choses in action, etc. Ordinarily, the law recognizes the rights and interest of property to be transferred by sale and purchase agreement or transfer
H according to various provisions of the Land Code or by deed of assignment or by vesting pursuant to various Acts, for example, Probate and Administration Act 1959 or BA 1967. Such sale and purchase agreement or transfers or assignments or vesting under the relevant Acts whether made in West Malaysia or East
I Malaysia must be recognised by the respective courts. Similarly a vesting order, made pursuant to s. 50, having obtained judicial

sanction, requires the court to recognize the new proprietor, or judgment creditor etc as the case may be. This is what s. 50 says and it reads as follows:

> (1) Where the Minister has granted his approval under section 49 (7) to an application in respect of an agreement or arrangement under section 49(1)(b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as "the transferor") and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as "the transferee") may make a joint application to the High Court by way of an *ex parte* originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders:
>
> (a) the date on and from which the agreement or arrangement shall take effect, being a date earlier or later than the date of the application (hereinafter in this section referred to as "the transfer date");
>
> (b) the vesting of any property held by the transferor, either alone or jointly with any other person, in the transferee either alone or, as the case may be, jointly with such other person, on and from the transfer date, in the same capacity, upon the trusts, and with and subject to the powers, provisions and liabilities applicable thereto respectively;
>
> (c) for any existing instrument, whether in the form of a deed, will or otherwise, or order of any court, under or by virtue of which any property became vested in the transferor, to be construed and to have effect as if for any reference therein to the transferor there were substituted a reference to the transferee;
>
> …
>
> (l) for all such incidental, consequential and supplemental orders as are necessary to secure that the agreement or arrangement shall be fully and effectively carried out.
>
> …
>
> (7) An order of the High Court under subsection (1) may relate to any property or business of the transferor outside Malaysia and, if it so relates, effect may be given to it either in accordance with any reciprocal arrangements relating to enforcement of judgments that may exist between Malaysia and the country, territory or place outside Malaysia in which such property or

A business is, or where there are no such arrangements, in accordance with the law applicable in such country, territory or place.

... .

B Section 50 order is like that of an omnibus order to vest title, rights interest inclusive of liability even under the respective Land Code without the need to execute transfer forms and payment of prescribed fees, inclusive of *ad valorem* duty. Section 50 has been considered in a number of cases and some of them have been C cited by the judgment creditor.

[16] With regard to whether the notice dated 29 December 2006 to sell by public auction on 14 January 2007 was bad in law, this requirement to give notice is specifically set out in s. 18(4)(a) of D HPA 1967. The principle relating to s. 18 of HPA 1967 can be summarised as follows:

(a) Section 18 sets out the manner wherein the hirer can recover or request the sale of the goods if it has been repossessed by the owner under s. 16 of the Act. This section also deals with E the manner the accounts between the owner and hirer has to be settled.

(b) There is a statutory requirement, in the event the owner intends to sell the goods by public auction, to give notice to F the hirer or if the sale is otherwise by public auction, to give the hirer the option to purchase the goods as set out in s. 18(4) of the Act. Failure of the owner to comply with strict provision of s. 18(4) will make him guilty of an offence under the Act.

G

If the letter has been posted, it is very unlikely on the facts of this case that it will have reached the judgment debtor within time. On this issue, I am inclined to accept the argument and reasoning of the judgment debtor. I take the view that the H mandatory requirement of s. 18(4)(a) in this case was not satisfied according to the intent and spirit of the law. In consequence, the notice under s. 18(4)(a) is bad in law thereby rendering all subsequent proceedings subject to judicial scrutiny. This can partly be achieved pursuant to s. 20 of HPA 1967 which states:

I

> This section gives wide discretion to the court to vary or discharge any judgment or order of any court against the hirer for the recovery of money so far as necessary to give effect to Section 18 of the Act.

[17] Further, I take the view that the judgment creditor was in breach of the salient terms of the HPA 1967, and had operated in an unreasonable manner in pursuing the bankruptcy proceedings without taking into considerations the interest of the judgment debtor and his lawful entitlement to set off the judgment sum from the proceeds of the sale. The judgment creditors' stand that they do not have to account to the judgment debtor is coercive and must be seen to be a proposition spiked with *mala fide*. If such facts are revealed at the stage of the hearing of the bankruptcy petition, then there are reasons for the court not to allow the petition.

[18] Further, on the facts of this case, I do not think that the creditor's petition ought to have been allowed. My reasons are as follows:

(i) The creditor's petition only alleges that the judgment debtor has committed an act of bankruptcy. This itself is not sufficient for the court to exercise its discretion, for s. 4 BA 1967 specifically says that the court may make the receiving order for the protection of the judgment debtor's estate. If the judgment debtor has no estate to protect then s. 4 of BA 1967 cannot be triggered. Courts have often said, even in cases for extension of time to file affidavits, that there must be some material before the court can exercise its discretion. This principle often echoed by courts is more relevant when it comes to depriving a subject of civil liberties. In such cases there is a duty and obligation to ensure the judgment creditor satisfies all requirements set out in s. 4 of BA 1967 before the debtor is made a bankrupt. I have dealt with this area of law in the case of *Re Siow Ah Moi; Ex p United Orient Leasing Company Bhd* [2007] 3 AMR 321; [2007] 8 CLJ 104, the relevant part is reproduced and reads as follows:

> > The submission of the respondent appears to be grounded on the basis that the creditor can at all times keep the bankrupt as a bankrupt until the bankrupt settles all of the obligation pursuant to law. I think that is not the purpose of the BA 1967. The object of the Act which I think is a social legislation to protect the bankrupt can be recognized as follows:

A (a) to secure fair and equal distribution of available property among the creditors;

(b) to free the debtor from his debts so that he can make a fresh start as soon as he is discharged by the court;

B (c) to deter people from rashly incurring debts they cannot pay;

(d) to vest the debtor's assets in the Director General of Insolvency for equal distribution to creditors; and

C (e) finally to discharge the debtor from bankruptcy and restore his civil status.

...

I think it is now an opportune moment for me to say that D it is wrong for creditors to think that they have a substantive right given by law to make a person a bankrupt or continue to keep them a bankrupt until their natural death. In my view it has never been the intention of parliament to give absolute right to creditors to make a person a bankrupt. The E discretion to make a person a bankrupt is entrusted to the courts and the courts can exercise the discretion not to make a person bankrupt according to the justice of the case. The relevant provision of the BA 1967 is section 4 which states as follows:

F Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, **the Court may on a bankruptcy petition** being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order. (emphasis added)

G

Further, the court is vested with the jurisdiction to discharge the bankrupt. In ordinary circumstances the court will make a person bankrupt if the conditions stated in section 5 of the BA 1967 is satisfied. It must be asserted that for all general principles and rules there are always exceptions. It may be H recognized exceptions pursuant to case laws or possible exceptions to be confirmed by case laws. This is an area where there appears to be a slow progress or no progress by jurist and judgments of courts within the bankruptcy regime to ensure deserving cases are not made a bankrupt I to ensure civil liberties guaranteed under the federal constitution are preserved according to the justice of the case.

Further in my judgment, in the case of High Court Kota Kinabalu *CWU No. K28-54 of 2004 PT Bank Mandiri (Persero) TBK v. Karambunai Corp Berhad* delivered on 20 June 2007, I have considered again the provision of s. 4 of BA 1967 and the relevant part is reproduced and reads as follows:

> 6. Under section 4, the court can only make a person a bankrupt if the creditor can satisfy the court that it is necessary for such an order for the protection of the estate of the debtor. If the debtor is a person having no asset like a pauper, tramp or vagrant or for that matter, dependants who do not have assets, a receiving order cannot be made as it will serve no useful purpose for the creditors and it will be against the object of the BA 1967.
>
> ...
>
> 7. The *sine qua non* for making a person a bankrupt is that the creditor must show that the debtor has some assets to trigger the bankruptcy regime. This is a statutory requirement as set out in section 4 of BA 1967.

[19] In my view, the BA 1967 is not meant to give the creditor the authority to punish the debtor by making him a bankrupt. It is only meant to assist the creditors to share equitably in the estate of debtor, provided there are assets. At common law, the *laissez fare* doctrine prevails in respect of all commercial transaction. The position is the same under our Contracts Act 1950 with some exception; for example, the Bankruptcy Act and Companies Act attempt to give some comfort to the creditors for their bad commercial judgments. That is all and nothing more.

[20] For reasons stated above, I dismiss the judgment creditor's appeal with costs. The getting up fees of this appeal shall not exceed RM10,000. If costs cannot be agreed the judgment debtor shall be at liberty to tax the costs. I hereby order so.